

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
 )  
Application by New York Telephone )  
Company (d/b/a Bell Atlantic – New York), )  
*Et al.* Pursuant to Section 271 of the )  
Communications Act of 1934, as amended, )  
To Provide In-Region, InterLATA Services )  
In New York )  
 )

CC Docket No. 99-295

COMMENTS OF EXCEL COMMUNICATIONS, INC.

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## **SUMMARY**

Excel Communications, Inc. (“Excel”) submits that Bell Atlantic and the New York Public Service Commission have made commendable progress in opening local markets in New York to competitive entry. However, while Bell Atlantic is far closer than any previous applicant to satisfying the applicable Section 271 criteria, it has not yet completed the process of opening local markets in New York or demonstrating that it presently and fully complies with all checklist items. As a result, the Commission cannot grant the application as filed. However, Excel submits that the Commission can proceed to grant *if* it explicitly resolves critical outstanding issues through conditions.

In its application, Bell Atlantic does not show that it is presently and fully complying with the checklist item for unbundled network elements (“UNEs”). Bell Atlantic imposes severe restrictions upon the availability, permissible uses, and potential subscribers regarding two critical UNE combinations – namely, UNE platform and enhanced extended loops (“EELs”). Those restrictions are obvious violations of Section 251(c)(3), which requires Bell Atlantic to offer “non-discriminatory access” to UNEs for the provision of any “telecommunications service” and to enable requesting carriers to obtain and use UNEs in combinations. Further, those restrictions constitute violations of at least four different Commission rules – all of which were in full force and effect when Bell Atlantic filed its application – designed to implement Section 251(c)(3).

Bell Atlantic apparently believes that it will come into full compliance with the statute and the UNE rules that were in effect when it filed the application at some later time when it complies with the Commission’s forthcoming UNE remand decision in CC Docket No. 96-98. However, Bell Atlantic must be in full compliance with the UNE checklist item upon grant of its

application. Therefore, the Commission should impose a condition that requires Bell Atlantic to comply with Section 251(c)(3) and all implementing rules adopted by the Commission, including those in the forthcoming remand decision, before Bell Atlantic enters the in-region interLATA market in New York.

In addition, Excel submits that any grant of Bell Atlantic's application should contain a condition on the use of total service resale by its Section 272 affiliate. That affiliate has incentives to use total service resale in ways that are practically infeasible for unaffiliated CLECs. *First*, unaffiliated CLECs cannot differentiate their services from Bell Atlantic's services when they use total service resale, while Bell Atlantic's affiliate presumably will seek to capitalize on the lack of differentiation. *Second*, Excel and others have documented that the margins afforded by total service resale are insufficient to sustain long-term entry, while Bell Atlantic's Section 272 affiliate is indifferent to the adequacy of the margins because its parent company provides the underlying service. *Third*, CLECs cannot use exchange access revenues to make up for the inadequate margins because total service resellers are not entitled to impose or collect exchange access charges, while Bell Atlantic's affiliate does not face any similar economic loss because its parent company will collect access charges for every total service resale customer it signs up. Therefore, Bell Atlantic's Section 272 affiliate will be able to use total service resale when other CLECs cannot, and this will create a strong incentive for it to fail to implement the UNE regime upon which Excel and other CLECs will depend for in-region local entry.

In order to remove the artificial competitive advantage that Bell Atlantic would have in the use of total service resale, as well as mitigate its corresponding incentive to undermine the UNE regime, the Commission should require Bell Atlantic to offer a wholesale discount rate to

unaffiliated CLECs that is 1.2 times the standard discount rate (*i.e.*, an additional discount of 20%). Excel believes that 20% is a conservative estimate of the artificial advantage that Bell Atlantic's affiliate would have over other CLECs due to its indifference to the margins afforded by total service resale and the unique ability of its parent to receive above-cost access revenues on long distance calls made by total service resale customers. Further, this condition is necessary to implement Section 272(g)(1), which permits the affiliate to "market or sell" its parent's local services only if unaffiliated CLECs have the same opportunity to do so. Without this condition, unaffiliated CLECs would have a markedly inferior opportunity to engage in total service resale compared to Bell Atlantic's Section 272 affiliate.

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**COMMENTS OF EXCEL COMMUNICATIONS, INC.**

Excel Communications, Inc. ("Excel"), by its attorneys, hereby files its comments with respect to the application filed by Bell Atlantic on September 29, 1999 for approval to provide in-region interLATA services in New York.

Excel applauds the significant progress achieved by Bell Atlantic and the New York Public Service Commission in directing, supervising and verifying Bell Atlantic's efforts to comply with the market-opening provisions of the Telecommunications Act of 1996 ("1996 Act") in order to qualify for entry into the in-region interLATA market in New York. Several other states, including Texas, are conducting similar proceedings, which almost certainly will produce additional Section 271 applications in the near future. While these proceedings have made undeniable strides toward opening monopoly local exchange markets, Congress required that a Bell Company fully comply with all statutory criteria and checklist items as a condition precedent to Section 271 relief. In past proceedings, the Commission correctly has perceived that the Section 271 application process is the most effective means available to it for ensuring

and enforcing a Bell Company's compliance with the local market-opening requirements of the 1996 Act.

Bell Atlantic has made great progress, but has not completed this process. Therefore, at a minimum, the Commission must attach several critical conditions to any grant of its application. Excel herein offers constructive proposals to that end.

## **I. EXCEL'S INTEREST IN BELL ATLANTIC'S APPLICATION**

Excel is the fourth largest long distance carrier in the United States in terms of presubscribed lines, and it is one of the fastest growing providers of telecommunications services in North America. Upon its merger with Teleglobe Inc. last fall, Excel became one of the world's foremost providers of domestic and international telecommunications facilities and services. Through resale, and increasingly through the use of its own backbone network facilities, Excel offers a full range of residential and business long distance services, as well as Internet access, paging, 800 service, and calling card services.

At the end of last year, Excel and its affiliated companies provided service to more than four million subscribers, approximately 80% of whom are residential. Excel provides services to subscribers in New York and every other state, and its customers are spread among urban, suburban and sparsely-populated areas. A significant portion of Excel's subscribers reside in rural areas. The only way that Excel can provide local services to its entire customer base is through combinations of unbundled network elements ("UNEs"), including the UNE platform (loops, switches and transport), priced according to total element long run incremental costs ("TELRIC"). Excel has studied and ruled out as economically impracticable other possible mechanisms for its entry into the local market, including building our own network, engaging in

total service resale, and obtaining services and facilities from other competitive local exchange carriers (“CLECs”). *See* Affidavit of J. Christopher Dance at 1-3, Attachment to Comments of Excel Communications, Inc., CC Docket No. 96-98, filed May 26, 1999 (copy attached) [“Dance Affidavit”]. Therefore, one of Excel’s principal interests in this proceeding is to ensure that it can enter the local market in New York broadly to serve all types of customers in all regions of the state through UNE combinations.

In addition, Excel believes that the availability of so-called enhanced extended loops (“EELs”), either as a single UNE or a combination of UNEs, will be critical to its long-term entry plans. Excel’s goal is to build-out local facilities, including collocation arrangements with self-provided switching capacity, if and when it is economically and technically feasible to do so on a market-by-market basis. This is the same general approach that Excel has followed in the interexchange market. Particularly as Excel begins to gain local market share in New York, it expects that in some locations it may become efficient to provide local and long distance services to end users through EELs. As a result, Excel wishes to make certain that Bell Atlantic does not enter the in-region interLATA market in New York unless and until all CLECs have a demonstrated and unrestricted ability to use EELs to provide local services.

Excel has serious concerns about other aspects of Bell Atlantic’s application, including its operations support systems (“OSS”) capabilities and the adequacy of its proposed performance and anti-backsliding measures. However, given that other parties will comment on those issues based upon their current and past experiences with Bell Atlantic in New York, Excel will not try to replicate that discussion, but instead will focus upon its critical business need to have the unrestricted capability of providing local services efficiently through UNE combinations, including the UNE platform and EELs.



## **II. THE UNE PLATFORM AND EELS**

Bell Atlantic does not make the showing required by Section 271 and the Commission's procedures that it is providing non-discriminatory access to UNEs as required by Section 251(c)(3) and the Commission's rules. The problem stems from restrictions placed by Bell Atlantic on the availability of the UNE platform and EELs. Bell Atlantic will make the UNE platform available for CLECs only to provide certain services and only in limited circumstances for business customers. *See* Bell Atlantic Application at 32. As for EELs, Bell Atlantic will make them available only if the CLEC complies with strict conditions designed to ensure that EELs are used primarily for local traffic. *Id.* Both sets of restrictions are unlawful, and they must be fully rectified by Bell Atlantic as a condition to grant of the instant application.

Section 271(c)(2)(B)(ii) requires Bell Atlantic to show that it is providing "[n]on-discriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). Section 251(c)(3) requires Bell Atlantic to provide all requesting carriers with "non-discriminatory access" to UNEs for the provision of any "telecommunications service." 47 U.S.C. § 251(c)(3). Further, it provides that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." *Id.* Bell Atlantic's restrictions on the UNE platform and EELs are in violation of these requirements. Bell Atlantic is discriminating in the access that it provides; it does not permit CLECs to use UNEs to provide any telecommunications service; and it restricts the ability of CLECs to provide services through UNE combinations.

Similarly, Bell Atlantic is currently in violation of several Commission rules adopted to implement Section 251(c)(3).

- Section 51.307(a) re-states the non-discriminatory access principle that is central to Section 251(c)(3). 47 C.F.R. § 51.307(a).
- Section 51.307(c) entitles a carrier to use a UNE to provide “any telecommunications service that can be offered by means of that network element.” 47 C.F.R. § 51.307(c).
- Section 51.309(a) prohibits an ILEC from imposing any “limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements” so as to impair the carrier from providing any service in the manner it desires. 47 C.F.R. § 51.309(a).
- Section 51.315(b) prohibits an ILEC from separating requested UNEs that it currently combines. 47 C.F.R. § 51.315(b).

For the same reasons that Bell Atlantic’s restrictions on the UNE platform and EELs violate Section 251(c)(3), they constitute violations the Commission rules implementing that provision.

It is now clear that in a Section 271 proceeding a Bell Company must present “actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.” *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, ¶ 55 (1997). However, Bell Atlantic disregarded its violations of applicable statutory and regulatory provisions, and posits that the only outstanding issue is whether the Commission’s forthcoming decision on remand from the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), will require modifications to Bell Atlantic’s restrictions on the UNE platform and EELs. See Bell Atlantic Application at 32-33. In effect, Bell Atlantic is asking the Commission to overlook its current non-compliance with the statute and the Commission’s rules because it will cure those violations

at some point in the future if and when it complies with the forthcoming remand decision in CC Docket No. 96-98.

Further, given Bell Atlantic's history of halting and incomplete implementation of the market-opening provisions of the 1996 Act, it is impossible to know whether Bell Atlantic would seek to impose other unlawful restrictions. As one example, Bell Atlantic's previous filings in New York indicate that it plans to impose a geographically variable "glue charge" on the UNE platform for business customers, a restriction that is incompatible with the Commission's current regulations. *See* Pre-Filing Statements of Bell Atlantic – New York, Case 97-C-0271 at n.10. In short, it is impossible for the Commission to conclude with certainty that Bell Atlantic will come into compliance with the statute and the FCC's current regulations unless it specifically conditions grant of the application upon Bell Atlantic's full compliance with Section 251(c)(3) and the Commission's current and forthcoming rules implementing that provision, and specifically its immediate removal of all restrictions on the availability of the UNE platform and EELs.

### **III. TOTAL SERVICE RESALE CONDITIONS**

If the Commission decides to grant Bell Atlantic's application, it should also adopt conditions preventing Bell Atlantic's Section 272 affiliate from obtaining artificial competitive advantages in the local and long distance markets through the resale of Bell Atlantic's retail local services pursuant to Section 251(c)(4) of the 1996 Act.

Section 272(g)(1) permits a Bell Company affiliate to "market or sell" the Bell Company's telephone exchange services if other CLECs can do the same. 47 U.S.C. § 271(g)(1). As shown in detail below, CLECs face inherent disadvantages to total service resale

under Section 251(c)(4) that Bell Atlantic's Section 272 affiliate will not face. In order to mitigate those disadvantages so that CLECs have closer to the "same" opportunity as the Section 272 affiliate to engage in total service resale, the Commission should give Bell Atlantic the option of (i) foregoing the use of total service resale in providing in-region local services, or (ii) if its Section 272 affiliate desires to engage in total service resale, providing total service resale to all other CLECs at a wholesale discount rate equal to 1.2 times the standard rate in New York (*i.e.*, a 20% discount). This condition should apply not only when Bell Atlantic's Section 272 affiliate seeks to provide local services itself, but when it enters into a co-marketing, co-provisioning or similar relationship with another entity that provides in-region local services through total service resale pursuant to Section 251(c)(4). This condition is necessary to ensure that Bell Atlantic does not use total service resale to undermine competition in the in-region local and interLATA markets, and to remove Bell Atlantic's incentives to defeat the provision of local services through the UNE platform and other UNE combinations.

#### **IV. THE COMMISSION'S AUTHORITY TO IMPOSE CONDITIONS**

The Commission has ample authority to impose conditions to the grant of a Section 271 application and to the provision of local services by Bell Atlantic's Section 272 affiliate. Section 201(b) broadly authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). Similarly, Section 271(d)(3)(C) prohibits the Commission from granting Bell Atlantic's application unless it finds the application to be "consistent with the public interest, convenience and necessity." The Commission repeatedly has construed similar "public interest" provisions to grant it authority to impose conditions on regulated entities. 47 U.S.C. §§ 214(c) & 310(d); *see*

*Office of Communication of the United Church of Christ*, 911 F.2d 803, 809 (D.C. Cir. 1990) (Section 310(d)); *Tele-Communications, Inc., and TeleCable Corporation Transfer of Control*, 10 FCC Rcd 2147, 2147 (1995) (Section 310(d)); *New England Telephone and Telegraph Co.*, 10 FCC Rcd 5346, ¶110 (1995) (Section 214).

Further, the Commission recently has broadly construed provisions in the 1996 Act which are similar to Section 272(g)(1)'s language permitting a Bell Company's affiliate to "market or sell" its parent's local services if CLECs can do the same. Subject to certain exceptions, Section 601(d) authorizes the Bell Companies to "jointly market and sell" commercial mobile services in conjunction with telephone exchange and other services. In construing Section 601(d), the Commission confirmed that "we retain authority to determine the permissible scope of . . . joint marketing." *See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, 12 FCC Rcd 15668, ¶ 82 (1997). The Commission noted that nothing in the plain language of the provision prohibits or limits its ability to "impose[e] conditions on, or defin[e] the permissible scope of, such joint marketing." *Id.* The same reasoning applies to the joint marketing provisions in Section 272(g)(1), and therefore the Commission has statutory authority to adopt conditions on the provision of local services by a Bell Company's Section 272 affiliate.

## **V. THE NEED FOR A TOTAL SERVICE RESALE CONDITION TO PROMOTE COMPETITION**

There is an urgent need for a condition on the use of total service resale by Bell Atlantic's Section 272 affiliate because that affiliate has incentives to use total service resale in ways that are practically infeasible for unaffiliated CLECs. In particular, none of the three major reasons

why CLECs cannot benefit from total service resale apply to Bell Atlantic's Section 272 affiliate.

*First*, total service resale entails that the CLEC take whatever retail service Bell Atlantic is offering, thereby depriving the CLEC of any significant ability to differentiate its service from Bell Atlantic's local service offerings. While this is a serious disadvantage for a CLEC, it is no disadvantage for Bell Atlantic's Section 272 affiliate, which will seek to capitalize on its relationship with Bell Atlantic and presumably will desire to underscore that its local services are the same as Bell Atlantic's.

*Second*, CLECs have ruled out total service resale as a long-term entry strategy because the margins are insufficient. As an Attachment to its comments in CC Docket No. 96-98, Excel presented an affidavit from the President of its Local Services Division noting that, based on a "systematic and thorough study" of total service resale in multiple states, Excel determined that relying upon total service resale is "infeasible" because "[t]he wholesale discounts made available to ILECs do not provide a sufficient margin to sustain long-term entry into the local market broadly through the United States to serve Excel's current customer base." *See Dance Affidavit* at 2-3. By contrast, Bell Atlantic's Section 272 affiliate will be indifferent to the absence of adequate margins in total service resale because its payments to Bell Atlantic are merely internal transfer payments (*i.e.*, pocket-to-pocket transfers). It will not be concerned about the local exchange wholesale rate, and whether it makes a separate profit on its local services, so long as its parent company makes a profit on the underlying retail service.

*Third*, a significant disadvantage of total service resale to CLECs is the inability to collect exchange access revenues for long distance calls to and from the end-user subscriber. Given the thin to nonexistent margins offered by total service resale in virtually all states, losing these exchange access revenues virtually ensures that a CLEC cannot serve the subscriber

profitably through total service resale. By contrast, Bell Atlantic's Section 272 affiliate will not suffer from this problem. Because Bell Atlantic will be collecting access revenues for each and every subscriber, and because its access charges continue to be well above its underlying costs, the Section 272 affiliate will not face any real economic loss from not being able to collect access charges, and will even have an economic incentive to engage in total service resale to maximize access charge revenues for its parent company. So long as the Bell Atlantic family of companies receives the exchange access revenues, the Section 272 affiliate will have an incentive to engage in total service resale regardless whether it can achieve a separate profit by doing so.

In these circumstances, permitting Bell Atlantic's Section 272 affiliate to engage in total service resale without conditions would cause immediate and lasting harm to both local and long distance competition. Because the affiliate could rely profitably upon total service resale for the provision of local services, it would have no incentive to provide local services through UNEs and, therefore, it would have no incentive to ensure that UNEs could be used efficiently and effectively for the provision of local services. Indeed, because other CLECs will have to rely upon UNEs and UNE combinations to provide local services, while Bell Atlantic's Section 272 affiliate could rely entirely upon total service resale, the affiliate would have an incentive to undermine the UNE regime in order to promote its own one-stop-shopping packages to end-user subscribers. As a result, if the Commission permits the affiliate to provide local services using total service resale, it would be creating a strong incentive for Bell Atlantic to make sure that the UNE regime does not work.

Our proposed condition – that Bell Atlantic's affiliate should not engage in total service resale unless Bell Atlantic offers total service resale to unaffiliated CLECs at a rate that is 1.2

times the standard wholesale discount rate – is fully consistent with Section 271(g)(1). As the Commission has recognized, this provision is intended to ensure that the affiliate engages in total service resale only when CLECs have the “same” opportunity. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd 21905, 22044 (1997) [“*Non-Accounting Safeguards Order*”]. For the reasons noted above, CLECs do not have the “same” opportunity to engage in total service resale as the Bell Company’s affiliate. While the condition proposed by Excel would not address all of the inequalities between the affiliate and CLECs in using total service resale, the condition would narrow the opportunity gap. Excel believes that an additional 20% discount for total service resale is a conservative estimate of the artificial advantage that Bell Atlantic’s affiliate would have over other CLECs due to its indifference to the margins afforded on total service resale and the unique ability of its parent company to receive above-cost access revenues on long distance calls made by total service resale subscribers. By putting the Section 272 affiliate and all CLECs on more nearly even footing for total service resale, the Commission would mitigate somewhat Bell Atlantic’s incentive to undermine the UNE regime. If CLECs can use total service resale on roughly the same basis as Bell Atlantic’s affiliate, Bell Atlantic will have much less to gain by failing to implement the UNE regime effectively.

Excel would note that the Commission recently imposed a similar condition upon its approval of the SBC/Ameritech merger as a means of encouraging residential competition in rural areas. There the Commission required the merged company to use a resale discount of 32% for an initial period of not less than 24 months and to offer total service resale a wholesale discount rate that is 1.1 times the standard discount rate for the remaining period of the condition. *See Application of Ameritech Corp. and SBC Communications Inc. for Consent to*



*Transfer Control*, CC Docket No. 98-141, FCC 99-279, rel. Oct. 8, 1999, ¶ 392 [*“SBC/Ameritech Order”*]. As regards Bell Atlantic’s application, the Commission should impose a similar condition to ensure that Bell Atlantic does not have incentives to use total service resale to undermine in-region local and long distance competition. Excel submits that a higher discount is warranted in this case (20% rather than 10%) to offset both Bell Atlantic’s indifference to resale margins and its ability to earn access revenues for total service resale customers.

The Commission’s decision not to prohibit SBC and Ameritech from using their advanced services affiliate to engage in total service resale has no bearing on Excel’s proposed condition. *SBC/Ameritech Order* at ¶ 472. Excel is not asking that the Commission prohibit Bell Atlantic’s affiliate from engaging in total service resale, only that it adopt a condition to ensure that CLECs have a non-discriminatory opportunity to do the same. Further, the *SBC/Ameritech Order* did not consider total service resale in the context of a full-service package involving in-region interLATA services. Excel’s proposed condition is directed at a danger that the Commission did not even consider in the *SBC/Ameritech Order* – namely, the extent to which Bell Atlantic can use total service resale through one-stop-shopping packages to distort competition in both the in-region local and long distance markets. As a result, the *SBC/Ameritech Order* weighs in favor of, not against, adopting the condition proposed herein.

Similarly, Excel’s proposed condition is fully consistent with the Commission’s previous determination not to preclude Section 272 affiliates from engaging in total service resale. In the *Non-Accounting Safeguards Order*, the Commission held that it could not prohibit the affiliate from engaging in total service resale because Section 251(c)(4) entitles “any requesting carrier” to resell the parent company’s retail local services. 11 FCC Rcd at 22056. Excel’s proposed condition would not prevent the affiliate from engaging in resale under Section 251(c)(4) should

it desire to do so. Further, nothing in that provision prevents the Commission from imposing conditions upon the affiliate's use of total service resale to promote the public interest. Indeed, as noted above, conditions such as we have proposed are necessary to implement the non-discrimination principle in Section 272(g)(1).

## **VI. RETAINING JURISDICTION OVER BELL ATLANTIC**

In the event the Commission grants Bell Atlantic's application, Excel respectfully requests that the Commission keep this proceeding open indefinitely so that parties will have a readily-available procedural vehicle to raise issues regarding Bell Atlantic's compliance with Section 271 and applicable conditions.

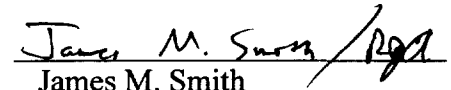
## **CONCLUSION**

For the foregoing reasons, Excel submits that the Commission should grant Bell Atlantic's application only if it imposes the conditions specified herein on non-discriminatory and unrestricted availability of the UNE platform and EELs, and on the use of total service resale by Bell Atlantic's Section 272 affiliate to ensure that Bell Atlantic cannot use one-stop-shopping packages to undermine in-region local and long distance competition.

Respectfully submitted,

EXCEL COMMUNICATIONS, INC.

By:

  
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**AFFIDAVIT OF J. CHRISTOPHER DANCE  
ON BEHALF OF EXCEL COMMUNICATIONS, INC.**

1. My name is J. Christopher Dance. I am President of the Local Services Division of Excel Communications, Inc. ("Excel"), which has its main offices at 8750 North Central Expressway, Dallas, Texas 75231. My telephone number is 214/863-8210. Prior to assuming my present position in late 1998, I served as Executive Vice President and General Counsel of Excel.

2. Excel provides long distance, international and other telecommunications services to end-user subscribers. Excel is the fourth largest U.S. long distance carrier in terms of presubscribed lines. As of the end of 1998, Excel and its affiliated companies provided service to more than four million subscribers. Approximately 80% of Excel's subscribers are residential. Excel provides services to subscribers in every State, and Excel's customers are spread among urban, suburban and sparsely-populated areas. A significant proportion of Excel's subscribers reside in rural areas.

3. Beginning in 1997, Excel has committed significant internal resources to developing and implementing a business plan to enter the local market broadly throughout the United States to provide local services to its existing (and prospective) customer base. As part of those efforts, Excel has obtained CLEC certification in 41 States. Excel formally established a Local Services Division in December, 1998, which is scheduled to have approximately 500 employees by December, 1999 and approximately 1,000 employees by January, 2000. Excel is prepared to make an initial investment of \$400 million to provide local services broadly to its customer base.

4. Excel has determined that it is infeasible to build-out last-mile connectivity to its pre-existing customer base. Excel does not have the financial resources necessary to implement such a plan. Indeed, since Excel's subscriber footprint is the entire United States, it is likely that no company has such resources. Further, because Excel's customer base is widely dispersed geographically and primarily consists of residential and other often low-volume subscribers, it is economically infeasible to build-out last-mile connectivity to serve Excel's current customers even if Excel had sufficient financial resources to do so.

5. Excel has determined that it is infeasible to rely upon non-ILEC suppliers of network functionalities for the provision of local services to its current customer base. Excel undertook a systematic and thorough study of the actual availability of such functionalities from non-ILEC suppliers in today's marketplace. That study showed that there are no current alternative telecommunications networks able to provide any of the functionalities (*e.g.*, loops, switching, transport) that would be necessary to provide local services to the large majority of Excel's current customer base. Further, that study showed that no CLECs anywhere offer Excel the ability to bypass ILEC-supplied functionalities altogether, and the systems necessary to permit Excel to meld ILEC-supplied and CLEC-supplied functionalities interchangeably into retail service offerings without paying penalties (*e.g.*, cost, quality, or time-to-market) do not yet exist anywhere.

6. Excel has determined that it is infeasible to rely upon local exchange resale for the long-term provision of local services to its current customer base. Excel undertook a systematic and thorough study of the local exchange resale arrangements available from ILECs in multiple

States where Excel has existing customers. The wholesale discounts made available by ILECs do not provide a sufficient margin to sustain long-term entry into the local market broadly throughout the United States to serve Excel's current customer base.

7. For the foreseeable future, the only way that Excel will be able to sustain long-term entry into the local market broadly throughout the United States to provide local services to its current customer base is through mandatory unbundled network elements ("UNEs") provided by ILECs in combinations (loops, switching, transport) at rates based on forward-looking long-run incremental costs. Because Excel's customer base consists largely of residential subscribers who often have relatively low traffic volumes, and because Excel has a low density of subscribers over a particular geographic areas, Excel will not be able to provide local services to those customers through UNE combinations if the ILECs can impose monetary penalties upon UNE combination users, such as "glue" charges, above and beyond the TELRIC-based rates for the combined UNEs.

8. Based upon its history and experience as a provider of domestic and international services on a geographically dispersed basis, Excel has concluded that UNE combinations at cost-based rates are necessary for it to provide broad-based competition to the ILECs for all types of customers. UNE combinations are particularly necessary for residential and other low-volume customers, as well as subscribers in rural and other sparsely-populated areas. If the FCC adopts rules that enable Excel to provide local services entirely through ILEC-supplied UNE combinations, Excel has established a business plan and organizational infrastructure to proceed

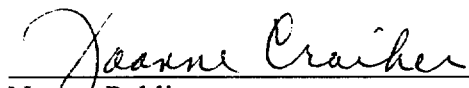
rapidly to introduce local competition broadly throughout the United States to serve its current (and prospective) customer base.

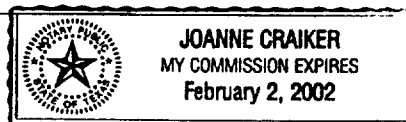
9 Uniform national rules on mandatory UNEs and UNE combinations are a prerequisite for Excel to implement its business plan to provide local services broadly throughout the country to a primarily residential customer base pursuant to a rapid, efficient roll-out. Because its customer base is widely-dispersed on a geographic basis and consists of many low-volume subscribers, Excel will not be able to cost-justify ubiquitous entry if its entry costs are inflated by the need to develop multiple entry strategies for different regions, or by the prospect of protracted, state-by-state litigation with ILECs to secure access to the necessary UNE combinations are cost-based rates.

Executed this 25<sup>th</sup> day of May 1999

  
J. Christopher Dance

SWORN TO and subscribed before  
me this 25<sup>th</sup> day of May, 1999

  
Notary Public



My Commission expires: 2-2-02

## CERTIFICATE OF SERVICE

I hereby certify that on this 19<sup>th</sup> day of October, 1999, a copy of the foregoing was delivered by hand, Federal Express, or first-class mail to the following:

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\_\_\_\_\_  
Marlene Borack

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